IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA, and THE OSAGE MINERALS COUNCIL,	)	
Plaintiffs,	)	
vs.	)	Case No. 14-CV-704-GKF-JFJ
OSAGE WIND, LLC; ENEL KANSAS, LLC; and ENEL GREEN POWER NORTH AMERICA, INC.,	)	
Defendants.	)	

DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND OPENING BRIEF IN SUPPORT

EXHIBIT 11

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,

Plaintiff,

and

OSAGE MINERALS COUNCIL,

Intervenor-Plaintiff,

-vs- Case No. 14-CV-704-GFK-JFJ

OSAGE WIND, LLC; ENEL KANSAS, LLC; and ENEL GREEN POWER NORTH AMERICA, INC.,

Defendants.

VIDEOTAPED DEPOSITION OF ROBERT C. FREAS

TAKEN ON BEHALF OF THE DEFENDANTS

ON APRIL 19, 2021, BEGINNING AT 10:04 A.M.

VIA ZOOM

REPORTED BY: Shannon S. Harwood, CSR, RPR, CRR

nearby and you could -- if you had rail available, you could ship it quite a long distance for railroad ballasts or -- or more durable kind of rocks, but no, there's -- there -- otherwise, there's a fairly local business.

Q. Okay. And are there any rocks or -- or materials at the Burbank Quarry?

A. No, it's limestone, shale and clay.

Q. Okay. And is there any rail available?

A. No.

Q. We're going to turn now just to a -- a brief discussion of the RMT report. I know you relied on this extensively. Do you agree with RMT's discussion of the geologic setting?

A. Yes.

MR. ASHWORTH: Object to form.

Q. (By Ms. Stevenson) Did you have any objections or -- or corrections that you may make to how RMT described the geologic setting of the wind project?

A. No, not particularly.

Q. Okay. Did you review other geologic studies that were conducted by Osage Wind?

A. No, RMT was the only report I looked at.

Q. Okay. So you did not review the 2014 Terracon report?

aware if the contractors crushed any of the limestone that they excavated?

A. The only place that I'm aware that they absolutely did was on the wind towers, the wind tower foundations.

Q. And are you aware with respect to the towers, the collector -- collector system, the substation, the transmission line, if materials that were excavated were returned to the excavated hole?

A. I am not. I'm making the assumption at least some of the material was used, because when I was on site, there was no -- there were no stock piles anywhere of unused material. It didn't appear that material had been stockpiled or stored and there was no reference in any of the construction documents that I saw of excess material being hauled away.

Q. I'd like to turn now to your expert -- back to your expert report and I'd like to discuss the -- how you calculated the volume of materials that were excavated. So what -- what was the total volume of materials excavated that you determined?

A. I have to look at my report and I believe on page 7, at -- at the bottom of the page, second paragraph from the bottom, it says, "Combining all of this data, it was determined that the excavation of 84

wind turbine tower foundations," and I'm just talking about the tower foundations, "comprised a total of 4,343,587 cubic feet which is equivalent to 160,874 cubic yards of material, which includes a total of 94,670 cubic feet (3,506 cubic yards) of material excavated to accommodate a place with a structural fill."

Q. And can you walk us through, please, what documents you reviewed and relied upon to reach this total amount of material for the foundation?

A. I reviewed the turbine foundation drawings and specifications that I'd referenced earlier. I believe it's Drawing 488 S1, 2 and 3, as well as the RMT report and their references in there to how material was to be placed back into the foundation -- over the foundations and I believe that's -- most of that is in Section 4 of that report, if I remember.

Q. Okay. And I -- I guess I -- I -- I need a little bit more -- more help on that.

A. Okay.

Q. How do we take this -- how do we take this information and what did you pull from it to get this 4,600,000-some cubic feet of material that was removed for the wind turbine towers?

A. The base part of it starts with the fact that

both Mr. Pfahl and I used similar calculations. I believe he used a 70-foot diameter. I took the 52-foot ring, there was a 52-foot ring, which was used for the base of the thing -- of the foundations. That was in one of the purchase orders. The 52-foot ring and then from all the pictures that I had, it was obvious that they had a work area that extended beyond the ring all the way around.

In one picture, there were a few men that were in there. I did my level best to scale off based on the -- the anticipated height of a man, what that was and I determined that it was probably about eight feet, which made the total width or the total diameter of the -- of the circle around the foundation 68 feet. As I said, Mr. Pfahl I believe used 70 feet.

So I had 52, feet plus eight foot on either side, and that gave you a base unit of -- times 10-foot height and you calculate that, set that number aside. And then I did -- if you look back at the report and you look at the drawings, most of the drawings -- the drawings indicate a one-to-one compaction limit on the sides for the material being placed back in the hole. You'll notice in the drawings, there's a -- a line that goes at a slight angle away from the foundations and in the RMT report, they set a two-to-one excavation for the

un -- the -- the material that was not limestone or wouldn't stand at a one-to-one angle.

I went through each of the drill holes for each of the foundations and determined that there were approximately 15, there could have been more, could have been less, but I determined 15 based on my own experience that would have been used at a two-to-one slope rather than a one-to-one slope.

Again, looking at the Dykon drill pattern that they laid out for their blasting, it -- it was all consistent with that, and so I used a one-to-one side slope from the ring out, as well as a two-to-one slope on 15. So taking that's, what, 15 from -- from 84, what, 59 holes, something -- 69 -- 70 -- 69 holes, whatever it was. At any rate, use 15 holes that I had two to one, the rest of them were one-to-one slope.

Well, you calculate that and add it to the base, and then the last thing I did was, again, look at each individual foundation and using, again, my engineering geology background and experience in -- in -- in mining determined that there was -- there were areas where they would have had to put structural fill.

I went back and looked at the Sanderfoot volumes of concrete placed and -- and -- and gravel used and tried to confirm that there was more material used

in some holes than others, and based on that, came up with the 3,506 cubic yards of additional excavation over and above the drawings for structural fill.

Putting those three -- three numbers together, I came up, then, with the 160,874 cubic feet -- or cubic yards or 4,343,587 cubic feet.

Q. Okay. Thank you. And you have to remember, you're -- you're working with a lawyer here, so I -- I have some questions that may seem very basic to you.

A. That's fine.

Q. You said -- you said based -- based on your experience, approximately 15 of the foundation sites were compacted at a two-to-one level rather than a one-to-one. Can you -- what experience is that based on?

A. Let -- let me correct your observation first. I'm looking at how it was excavated to --

Q. Okay.

A. -- a two to one, because the side slopes on the -- on the holes where you have material that's not -- not limestone all the way to the top, you have to lay them back at an angle of repose or a side slope that will be appropriate for the work environment. So that -- whether you're looking at OSHA specifications or -- or general health and safety, you don't want material

screening, they didn't just screen limestone. They screened shale. They screened clay. They screened everything that came out of that hole in order that there was no oversight, so yes, they -- they screened, they may not have crushed, but they screened shale.

Q. And did they also screen clay?

A. They had to.

Q. Did you find any note that there was crushing done of clay or shale?

A. No.

Q. You said you reviewed Mr. Pfahl's report; is that correct?

A. Yes, I did.

Q. And if I'm correct, I believe you came up with different total numbers for the amount of material that was excavated for the foundation; is that correct?

A. That is correct.

Q. And are you going to offer any opinions on Mr. Pfahl's conclusions or methodologies with respect to the quantity of material excavated for the foundation?

A. Mr. Pfahl's -- Mr. Pfahl appears, from what I saw, to be a well-qualified individual for -- for what he was retained for. I disagree with Mr. Pfahl in -- in a couple of areas, one of which is that I believe that I was more detailed than he was when it came to looking at

the excavation of the side slope material beyond the vertical cone, if you will, that was -- was done, but more importantly, I disagreed with Mr. Pfahl in terms of the definition of mining.

I don't -- I do not agree with the definition of mining being restricted to material that is only crushed. There are any number of instances that I have been in mine properties where no material was crushed, but the material was still mined.

When you look at the definition in the Tenth Circuit ruling, they weren't trying to identify -- in my opinion, they were not trying to identify individual items that had to be performed on the rock material, but they were looking at the -- the process, and the process is excavating and making the material ready and/or using it.

And they specifically noted in the report, there are times when common materials such as limestone, sandstone, shale, sand and gravel, do not have to have any kind of treatment, but can still be used. And, in fact, the RMT report said, We think these materials can be used for this kind of fill.

So to me, the mining that took place included all of the materials that was -- were excavated. To me, the issue is excavated and used, and as a consequence, I

MS. STEVENSON: Okay.

MS. NAGLE: Thank you.

MS. STEVENSON: We'll -- we'll plan on doing that. Thank you.

Q. (By Ms. Stevenson) So the next section of your report starting on page -- page 10 goes to the valuation of the mineral material.

A. That's correct.

Q. So when you were looking at the valuation of the material, was this a market value you were looking at?

A. I looked at the -- again, went back to the Tenth Circuit ruling and the Tenth Circuit made it very clear that it was -- the value of the minerals was to be 10 percent of the market price of -- of material at the closest point to the project. Given the fact that IEA exercised a purchase order with Burbank Materials, which was essentially next door, for limestone, shale and clay, it was simply a matter of looking at 10 percent of the purchase price and moving from there.

Q. So to determine the -- the market price, you relied on that Burbank invoice; is that correct?

A. I actually looked at the purchase order that was made by IEA and then used the Burbank to confirm that, in fact, the material was actually sold at the

price that was in the purchase order.

Q. Okay. And did you rely on any other documents or types of information to determine the market price for limestone, shale or clay in 2014?

A. No, because as far as I was concerned, the price paid for that particular project, each project stands on its own. That was the price that was paid. That was the price that -- that was established.

Q. How would you define a market price?

A. A market price is the price that a willing buyer and a willing seller agree to exchange materials.

Q. And I'd like to explore some -- before I come back to that, I'd like to explore some -- the 10 percent royalty rate.

A. Uh-huh.

Q. And you -- you mentioned the Tenth Circuit opinion. What else did you rely on to determine the appropriate royalty rate?

A. I didn't. Tenth Circuit had settled it as far as I was concerned.

Q. Did you -- when -- when you were visiting Burbank and you spoke with them there, did you ask them about the royalty rates that they paid to the OMC?

A. No.

Q. Okay. Did you do any research into the

A. The shipping point would be the source point for material being shipped to the buyer.

Q. And why is Burbank the -- the shipping point?

A. From -- there were no other quarries closer to the wind farm that could have provided material other than Burbank Materials. Pawhuska Quarry is quite a ways further as is the -- I wish I could remember what was in the other -- in Mr. Pfahl's report, the Atlas Quarry or whatever it was that was also -- APAC, the APAC --

Q. APAC.

A. -- Quarry that was -- was referenced, but again, that is further away than Burbank Materials.

Q. Are you aware if these -- these other quarries if their -- the rates they charge for limestone, clay or shale were different than that charged at Burbank?

A. I never looked at price lists from any of those properties.

Q. And so on -- on page 11, your total value of royalties that should be paid you have as $247,979.42; is that correct?

A. That's correct.

Q. And you state that's the value of mineral materials for the 84 wind turbine towers and associated equipment can you just lay out for me what that associated equipment is?

Q. (By Ms. Stevenson) And when we're talking about all of the materials that were excavated and then subsequently returned to the -- to the excavated hole, was everything that was put back in the hole, was it all available for purchase elsewhere?

A. If it was anything other than -- yeah, the limestone, shale and clay were specified in the purchase order. Limestone, shale and clay was what was dug up. Limestone, shale and clay is what is available from Burbank Materials.

Q. Okay. Thank you. I have a couple of questions for you now about Mr. Pfahl's report, and you said you reviewed that; is that correct?

A. Yes, I did.

Q. Do you intend to offer any opinions at trial on Mr. Pfahl's report?

A. I don't anticipate that. However, one of the lawyers may ask me a question or whatever, but I don't anticipate specifically saying anything about Mr. Pfahl's report.

Q. So do you -- you don't intend to put any opinion you may have about Mr. Pfahl's report in writing as either an update or an addendum to your report?

A. No, I do not.

Q. And did you review Mr. Pfahl's deposition

referenced in the Tenth Circuit. Then from -- when you get to the value, you then take 10 percent of that and that's the royalty.

Is that correct?

A. I took 10 percent of what the purchase price was at the nearest shipping point, which is the Tenth Circuit ruling, and took 10 percent of that, yes.

Q. What would be -- to get that purchase price or -- or the price, so let's say -- we'll start with clay. It would be $6 times 71,082 tons; is that correct?

A. That -- that would be the shale. The clay would be 61,082 and that would be times $6. The shale would be 72,404 tons time $6, and the limestone 188,638 times $8.90.

Q. Would you mind just quickly just doing the math and then telling me what --

A. It would --

Q. -- it adds all up?

A. Yeah, it would simply be a matter of multiplying the numbers that are there on page 11 by 10, so that the total would be 2,479,794.20.

Q. Okay. Earlier, Ms. Stevenson asked about any criticisms that you intend or -- or -- or presently intend to -- to offer about John Pfahl's report at trial. And I just want to clarify or -- for the record

at least for me that you have no intentions outside of what you've already discussed today; is that correct?

A. That's correct. I -- I think Mr. Pfahl's a -- a professional man and -- and I am -- I'm not one who wants to particularly engage in an argument with him or -- or -- or a discussion of methodology. I mean, we simply -- we disagreed in -- in how we approached it and I think that was based upon, as much as anything, his view of -- of restricted into crushed material versus mine of using all of the materials that were there.

MR. ASHWORTH: Okay. I have no further questions for the witness, but I would, before I pass to Sarah -- back to Sarah, Ms. Stevenson, to see if she would be willing to accept service of the subpoena of -- of John Pfahl just so we can have that on the record?

MS. STEVENSON: Mr. Ashworth, of we can just -- I'd like to consult with my co-counsel on that question as well as just to make sure we don't have any followup. So if we could take maybe five minutes and then I will get back to you on -- with an answer to that question when we come back.

MR. ASHWORTH: No problem.

MS. STEVENSON: Okay. So if we can just go off the record until 1:10.

THE VIDEOGRAPHER: We're off the record at